



STATE BOARD OF EQUALIZATION STAFF LEGISLATIVE BILL ANALYSIS

Date Amended: **4/21/04**

Bill No: **AB 2061**

Tax: **Business Activity Tax
Sales and Use Tax**

Author: **Haynes**

Board Position:

Related Bills:

BILL SUMMARY

This bill would enact the Business Activity Tax Simplification Act setting forth the minimum California contacts needed to subject a person to California Tax.

Summary of amendments

Amendments added provisions providing that the storing of materials, goods, or products in a public warehouse pursuant to a public warehouse contract shall be disregarded in determining whether the 21 day limit has been met.

ANALYSIS

Current Law

Section 6051 of the Sales and Use Tax Law provides that retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempt by statute. When sales tax does not apply, such as when sales take place outside of California, the use tax, measured by the sales price of the property sold, applies to the use of property purchased from a retailer for storage, use, or other consumption in California. Although the purchaser owes the use tax, Section 6203 currently provides that a retailer engaged in business in this state is required to collect the use tax from the purchaser and pay it to the state.

Section 6203 defines “retailer engaged in business in this state” for purposes of the Sales and Use Tax Law to include, among other activities, the following:

- Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary or agent, an office, place of distribution, sales or sample room, warehouse or storage place, or other place of business.
- Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

However, under the provisions of Section 6203, a retailer is *not* regarded as engaged in business in this state if that retailer’s sole physical presence in California is to engage in convention and trade show activities for not more than 15 days during a 12-month period, and the retailer did not derive more than \$100,000 of gross income from those

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activities during the prior year. The law provides, however, that the retailer is liable for tax on any sales occurring at the show, or pursuant to an order taken at the show.

Proposed Law

This bill would add Part 33 (commencing with Section 66001) to Division 2 of the Revenue and Taxation Code to enact the Business Activity Tax Simplification Act. This bill would provide that no person shall be subject to a business activity tax imposed by this state unless that person has a physical presence in this state during the taxable period with respect to which the tax is imposed.

This bill would define the term “business activity tax” to mean all of the following:

- A tax imposed on, or measured by, net income.
- A tax imposed on, or measured by gross receipts, gross income, or gross profits.
- A business license tax.
- A franchise tax.
- A single business tax or a capital stock tax.
- Any other tax imposed in this state on a business for the right to do business in this state or measured by the amount of, or economic results of, business related activities conducted in this state.

This bill also provides that a “business activity tax” does not include a transaction tax.

This bill provides that a person has a physical presence in this state only if that person’s business activities within this state include any of the following:

- Being an individual physically in this state, or assigning one or more employees to be in this state, on more than 21 days.
- Using the services of another person, except an employee, in this state, on more than 21 days to establish or maintain the market in this state, unless that other person performs similar functions on behalf of at least one additional business entity during the taxable year.
- The leasing or owning of tangible personal property or real property in this state on more than 21 days.

This bill also provides that the storing of materials, goods, or products in a public warehouse pursuant to a public warehouse contract shall be disregarded in determining whether the 21 day limit has been met.

The 21 day rule would not apply to a person that is incorporated or formed under the laws of this state or commercially domiciled in this state. Also, the physical presence is met on the first day for sales of tangible personal property within California where delivery of the property originates and is completed within the state.

The provisions in this bill would become effective immediately, but the provisions of this bill would become operative on and after the first day of the first calendar year that begins after the effective date.

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COMMENTS

1. **Sponsor and purpose.** This bill is sponsored by the author to provide a clear definition of nexus and to limit taxation to persons physically located in California.
2. **Summary of amendments.** The April 21 amendments added provisions providing that the storing of materials, goods, or products in a public warehouse pursuant to a public warehouse contract shall be disregarded in determining whether the 21 day limit has been met.
3. **Would a business activity tax include the sales and use tax?** The purpose of this bill is to establish clear nexus guidelines for business activities in this state. This bill defines a “business activity tax” to include a tax imposed on, or measured by gross receipts. This definition would include the sales tax as sales tax is measured by gross receipts. However, use tax is measured by the sales price, not gross receipts. Therefore, it does not appear that the definition of “business activity tax” would apply to use tax. Additionally, this bill also provides that a “business activity tax” does not include a transaction tax. Although this bill does not define what a transaction tax is, it is generally understood that a tax imposed on a sale or purchase (transaction) would be a transaction tax, which appears to contradict the provision that a “business activity tax” includes a tax measured by gross receipts. As such, the provisions of this bill would not apply to use tax transactions, but may apply to sales tax transactions.
4. **Warehousing provisions.** This bill contains a provision that excludes the storing of materials, goods, or products in a public warehouse pursuant to a public warehouse contract from the 21 day rule used to establish nexus. This provision would be in conflict with Section 6203 of the Sales and Use Tax Law which provides that a person is engaged in business in this state if they are utilizing warehouse or storage space in this state.
5. **One day rule versus 21 day rule.** The provisions in this bill provide that nexus exists only if the seller had a physical presence in this state for more than 21 days. This bill also provides that the 1 day rule would apply in place of the 21 day rule when the sale within this state of tangible personal property originates and is completed within this state. However, this situation would be a sales tax situation, not a use tax situation, so nexus is not an issue. For use tax situations where nexus is still an issue, it appears that the 21 day rule would still apply.
6. **This bill would provide a more lenient standard for nexus than current sales tax law provides.** Assuming the provisions of this bill apply to sales and use tax, nexus would only exist if the seller had a physical presence in this state for more than 21 days. However, this provision would be in conflict with current sales and use tax law. Under Section 6203, a retailer is *not* regarded as engaged in business in this state if that retailer’s sole physical presence in California is to engage in convention and trade show activities for not more than 15 days during a 12-month period, and the retailer did not derive more than \$100,000 of gross income from those activities during the prior year. The law provides, however, that the retailer is

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liable for tax on any sales occurring at the show, or pursuant to an order taken at the show.

Additionally, current law provides that if an out-of-state retailer is regularly sending a representative to California for the purpose of selling or delivering property, the retailer is deemed to be engaged in business in this state, regardless of the number of days in this state and the amount of income derived from such sales.

Due to the conflicts between the provisions in this bill and Section 6203, it is recommended that this bill be amended to either conform the provisions of this bill to Section 6203, or include amendments to Section 6203 so it is consistent with the provisions in this bill.

COST ESTIMATE

A detailed cost estimate is pending.

REVENUE ESTIMATE

A detailed revenue estimate is pending.

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